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No. 05-1345

IN THE

# Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

*Petitioners*,

*v.*

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF *AMICI CURIAE* OF ECONOMIC DEVELOPMENT GROWTH ENTERPRISES CORPORATION, A/K/A MOHAWK VALLEY EDGE, SPOHN'S DISPOSAL SERVICE, HAWKINS & HURLBUT SANITATION, INC., STB ENTERPRISES, INC., LEFTOVER EXPRESS, INC., GRAHAM'S REFUSE SERVICE, MARSHALL PRZYLUKE, INC., R.D.'S MOUNTAIN VIEW TRUCKING, JIM BONNELL TRUCKING, INC., CONTROLLED WASTE SYSTEMS, INC., AND FRED BURROWS TRUCKING AND EXCAVATING, L.L.C. IN SUPPORT OF RESPONDENTS**

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*Amici curiae* Economic Development Growth Enterprises Corporation, also known as Mohawk Valley Edge, Spohn's Disposal Service, Hawkins & Hurlbut Sanitation, Inc., STB Enterprises, Inc., Leftover Express, Inc., Graham's Refuse Service, Marshall Przyluke, Inc., R.D.'s Mountain View Trucking, Jim Bonnell Trucking, Inc., Controlled Waste Systems, Inc., and Fred Burrow's Trucking and Excavating, L.L.C. submit this brief in support of Respondents Oneida-Herkimer Solid Waste Management Authority, County of Oneida, and County of Herkimer.[1]

## STATEMENT OF INTEREST OF *AMICI*

### I. Mohawk Valley Edge

The Oneida County Industrial Development Corporation was formed in 1963, pursuant to New York State Not-For-Profit Corporation Law Section 1411. As set forth in the enabling state statute, the purpose of the Oneida County Industrial Development Corporation was to foster and promote economic development and to create job growth within Oneida County, including the specific listed statutory purposes as follows:

> relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, instructing or training individuals to improve or develop their capabilities for such jobs,

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1. No portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioners and the Respondents have both consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

> carrying on scientific research for the purpose of aiding a community or geographical area by attracting new industry to the community or area or by encouraging the development of, or retention of, an industry in the community or area.

New York State Not-For-Profit Corporation Law § 1411.

In 1997, the Oneida County Industrial Development Corporation amended its corporate documents to reflect a change in its name to Economic Development Growth Enterprises Corporation. The new entity also adopted the assumed name of Mohawk Valley EDGE. Mohawk Valley EDGE continued to function as the economic development agent for the County of Oneida, but expanded its efforts to include economic development in the County of Herkimer.

In 1997, Mohawk Valley EDGE also began providing staff services by contractual relationship to the other major economic development entities in Oneida County: the Oneida County Industrial Development Agency, created by the New York Legislature in 1970 by New York State General Municipal Law § 901 (to provide financing and tax incentives to industrial development), and the Griffiss Local Development Corporation, an entity created by specific act of the New York State Legislature in 1994 (to redevelop the former Griffiss Air Force Base into a business and technology park).

By staffing three distinct and separately constituted agencies with separate missions, Mohawk Valley EDGE provides a "one-stop shop" for potential developers interested in locating in the two-county area and for existing local businesses interested in growing their operations.

As part of its corporate purposes, Mohawk Valley EDGE coordinates an outreach program to existing employers within the two-county area, visiting approximately three hundred local employers annually to discuss local issues and the business climate, to help address their concerns and to assist them with opportunities for growth and new investment. On a global scale, Mohawk Valley EDGE promotes the region's business climate, quality of life, infrastructure, utilities, work force and developable sites to businesses, site selection specialists and industrial developers. Mohawk Valley EDGE develops financing and assistance packages for both new and expanding businesses and finds suitable existing buildings or "shovel-ready" sites for construction or location of a new facility.

Mohawk Valley EDGE is governed by a self perpetuating Board of Directors, representing many of the largest employers in the two county area, including manufacturers, back office businesses, banks, professional offices, private higher education institutions, service providers and retail establishments. Based on its Board membership and representation, it can safely be said that Mohawk Valley EDGE represents approximately half of the workforce in the two county region.

Mohawk Valley EDGE's interest in this appeal can be summarized as follows: 1) The benefit to local businesses and industries of a financially viable comprehensive waste management program; 2) The reduction and/or elimination of exposure of the local businesses and industries to costly environmental tort suits; and 3) The ability to attract new businesses to the area because it can guarantee proper solid waste management without unwarranted liability. These elements are critical to the creation of a business climate supporting economic development, business growth and job creation.

## II. Spohn's Disposal Service, Hawkins & Hurlbut Sanitation, Inc., STB Enterprises, Inc., Leftover Express, Inc., Graham's Refuse Service, Marshall Przyluke, Inc., R.D.'s Mountain View Trucking, Jim Bonnell Trucking, Inc., Controlled Waste Systems, Inc., And Fred Burrows Trucking And Excavating, L.L.C.

Mohawk Valley EDGE is joined in this brief by the following hauling companies: Spohn's Disposal Service, Hawkins & Hurlbut Sanitation, Inc., STB Enterprises, Inc., Leftover Express, Inc., Graham's Refuse Service, Marshall Przyluke, Inc., R.D.'s Mountain View Trucking, Jim Bonnell Trucking, Inc., Controlled Waste Systems, Inc., and Fred Burrow's Trucking and Excavating, L.L.C (hereinafter collectively referred to as the "hauling companies"). The hauling companies provide solid waste collection services to the public in all of the seventy-eight cities, towns and villages compromising Herkimer County and Oneida County.

The hauling companies share in Mohawk Valley EDGE's interest in this appeal as members of the business community but also have a unique interest as integral participants in the existing comprehensive waste management system. They directly benefit from the opportunity to participate in the collection aspect of the system and from the cooperation and responsiveness of the Oneida Herkimer Solid Waste Management Authority. They also benefit from the protection provided to them from the potentially unlimited environmental liability associated with their business.

## SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals correctly applied the *Pike* balancing test to Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 and found that the local benefits of the flow control laws were clear and substantial.

The business community, including the hauling companies, benefit from a financially viable comprehensive waste management plan. Such a plan provides a business-friendly atmosphere that aids in attracting new industry, in encouraging growth of new industry and in creating new jobs for the region.

The business community, including the hauling companies, also benefit from the reduction of or elimination of costly tort suits. The existing plan commits the Oneida Herkimer Solid Waste Management Authority as the responsible party, both practically and legally, to protect the users against future environmental liability.

These benefits are critical to the survival and growth of the local economy, and could not be achieved in any other way.

## ARGUMENT

### I. The Second Circuit Was Correct In Finding That The Local Benefits To The Local Laws Are "Clear And Substantial"

The Second Circuit Court of Appeals considered the validity of Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 under the *Pike* balancing test. Pet. App. at 29a. Said test, as set forth in the 1970 opinion, requires the following analysis:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In applying the *Pike* test, the Second Circuit found that "(t)he ordinances' benefits . . . are clear and substantial." Pet. App. at 29a. The Court elaborated as follows:

> Our conclusion that the assumed burden created by the challenged ordinances is slight means that the defendants need to present only a minimal

> showing of local benefits in order to compel a finding that the burden is not 'clearly excessive' to the benefits that the ordinance provides. The Counties' flow control regulations easily clear this hurdle.

Pet. App. at 29a.

### A. The Business Community And Hauling Companies Benefit From A Financially Viable Comprehensive Waste Management Program.

There are three basic "public utility" functions that are essential to economic growth and business development within a region: 1) a system for providing a clean supply of water; 2) a system for properly treating and disposing of wastewater discharge; and 3) a system for properly managing and disposing of solid waste. Pet. App. at 472a. In simplest terms, these services are regularly described as "water", "sewer" and "garbage", and businesses traditionally look to their local governments to adopt and implement comprehensive plans for these necessary services.

Each service is seen as equally important for a successful business climate. As stated in the affidavit of now retired Oneida County Planning Director Michael Gapin:

> A public solid waste management system is just as important as a region's water and wastewater systems. If there cannot be public oversight and control of the solid waste collection system, it is akin to having a public water supply reservoir or a wastewater treatment plant without the pipes.

Pet. App. at 488a, 489a.

The importance of a comprehensive solid waste management plan was recognized by the District Court. Judge Mordue specifically held that it was obvious that the waste management scheme adopted by the two Counties had or would improve the local economy in attracting new businesses and creating new jobs. Pet. App. at 21a. Judge Peebles held that the two Counties' waste management plan meets a "legitimate desire to provide a business-friendly atmosphere designed to attract industry and provide jobs in the community". Pet. App. at 19a.

Through their elected officials, the counties of Oneida and Herkimer adopted a comprehensive plan designed to match the best management method to each component of solid waste. Pet. App. at 461a. The plan contains a strong recycling component, but also emphasizes the benefit of this component to businesses. As of November of 2006, local businesses have been able to obtain over four hundred free waste "audits" performed by the Oneida Herkimer Solid Waste Management Authority, to improve their recycling and thereby reduce their waste disposal expenses. These waste "audits" also provide an opportunity for the identification of hazardous wastes and the development of the most appropriate and cost-effective disposal methods. Pet. App. at 425a, 382a.

The most fundamental concern of businesses and industries in regards to utilities, both public and private, always relates to cost. Removal of solid waste is part of the overhead of any business, and stability in overhead costs is critical to both short-term and long-term budgeting. The solid waste plan adopted by the two counties provides much-needed stability in the economically tumultuous area of solid waste disposal. The plan allows for the distribution of costs

commensurate with the disposal demands of each user. This in turn allows businesses to accurately project and budget for the costs related to their present and future solid waste removal needs.

The hauling companies also directly benefit from the existence of a comprehensive plan. They are given the opportunity to provide collections services to the public over the two thousand three hundred square mile area that comprises the two counties. The Oneida Herkimer Solid Waste Management Authority has been and continues to be responsive to their needs, offering conveniently located transfer stations with expanded hours and days of operation and with equipment designed to significantly reduce waiting times. They are able to dispose of all types of waste collected from the public, including recyclables and green waste. All of the haulers, both large and small, are treated equally and fairly as to disposal costs, regardless of volume of waste delivered to the transfer stations. The hauling companies clearly share in the benefits related to consistent, predictable costs and a stable system.

The agreement of the hauling companies to participate as amici curiae in this Brief is quite remarkable, and indicates that they do not feel "left behind" or aggrieved by the current comprehensive system. Instead, they feel that their partnership with the Oneida Herkimer Solid Waste Management Authority provides them with financial constancy and reliability.

### B. The Business Community And The Hauling Companies Benefit From The Reduction Or Elimination of Costly Environmental Tort Suits.

Any business contemplating a relocation or expansion of its operations immediately considers the issue of potential environmental liability at its new or expanded facility. The reduction or, if possible, elimination of environmental liability is one of the most significant factors in site selection.

Businesses within Oneida and Herkimer Counties are uniquely aware of the environmental liabilities that can result from the remediation of a landfill. In recent history, many local businesses have experienced the traumatic effects of cost recovery actions based on CERCLA. *See* 42 U.S.C. § 9601 *et seq.*

During the cost recovery efforts associated with the remediation of the former Ludlow Landfill, six hundred and three local businesses, individuals, haulers, school districts and other entities were sued and forced to incur legal fees and settlement costs. Pet. App. at 416a, 450a, 452a. The record is replete with references to this litigation and its disastrous effect on the local business community.

In 1996, over one hundred local businesses and haulers were subject to yet another intense investigation as potential responsible parties, as a result of the discovery of hazardous waste in the City of Rome, New York's former municipal landfill. After a six year investigation, during which many of the businesses hired counsel and incurred substantial legal expenses, six businesses were ultimately named in a state Superfund recovery action. The investigation and litigation occurred even though the City had closed the landfill almost

a decade earlier in accordance with the standards set by the New York State Department of Environmental Conservation. The businesses had to pay legal fees for defense and the six named businesses had to pay settlement costs, due to lack of oversight at the facility and the improper disposal practices of a limited number of bad actors.

These cost recovery suits under the "Superfund" laws are based on the statutory scheme's imposition of "strict, joint and several liability" for any users who sent its solid waste to the particular landfill. The liability will attach whether or not the user knew of the waste disposal practices at the landfill. The liability will attach whether or not the user knew about other users of the landfill and their waste disposal practices. The liability will attach whether or not the user even knew which particular landfill was actually receiving its solid waste from its hauler. The liability will attach even if the past waste disposal practices were permitted at the time they took place. The message of the statutory scheme is clear to the business community: if your business is named in a Superfund cost recovery action, the liability will attach. *See* 42 U.S.C. § 9601 *et seq.*

Once a business is investigated and/or brought into one of these suits, either as a defendant or as a third party defendant, it will incur legal and other professional fees for investigation, litigation and negotiation. It will also most likely have to pay some sort of settlement in order to be released from the suit. The settlement is often greater than the business' fair share of the clean-up costs, because the cost of litigating the issue of each parties' exact share of the culpability is cost prohibitive. Pet. App at 477a, 478a.

The business communities of both Oneida and Herkimer County have not forgotten the lessons learned during the Ludlow landfill and the Rome City landfill remediation and cost recovery efforts. As stated by Hans Arnold, Executive Director of Respondent Oneida Herkimer Solid Waste Management Authority, in his 1995 affidavit, in regard to the Ludlow matter:

> Citizens were sent a bill to clean up a problem they thought they had left at the curb years ago. They never expected it to return.

Pet. App. at 416a

This sentiment is echoed in the newspaper quote set forth in the affidavit of Robert Julian:

> Everybody in the County is going to be responsible up to 20 years for whatever they threw out, ***and for whatever their garbage man might have done with it*** —Edward A. Zammiello, Jr., Co-Owner Frank's Body Works.

(Emphasis added). Pet. App. at 452a.

Mr. Zammiello's quote emphasizes the need of the business community for a solid waste management plan that provides protection from environmental liability. The evidence establishes that the comprehensive plan adopted by Oneida and Herkimer Counties provides that protection.

Hans Arnold provided a statement about the protection systems used by the Authority once it is in possession and control of the solid waste. Before disposal, the Authority

monitors and inspects the waste to insure that it has not received any dangerous or hazardous materials. The Authority used extreme care in ensuring that the waste was only sent for disposal to facilities with the best environmental protective systems and proven management experience. Pet. App. at 426a, 427a, 428a.

The benefit of this process to the users and the hauling companies is immeasurable. As stated in the expert opinion of Dr. Robert N. Stavins, private waste haulers would not likely have the resources to expend similar efforts to evaluate the environmental consequences of their choices. Further, it would not be financially feasible or practical for each user to gather this type of information.

> While this information may be costly to gather, once gathered, its benefits can be shared with all waste generators without cost. Therefore, while for each generator the benefits of gathering this information may not outweigh the costs of doing so, the benefits enjoyed by all the Counties' waste generators may far outweigh the cost to the Authority of collecting and sharing the information. Put simply in terms of conventional economics, public good tends to be under-provided by ordinary private means.

Pet. App. at 385a.

The most important benefit to the business community, including the hauling companies is the theory of collective responsibility for potential future environmental liability. Pet. App. at 427a. As stated by Hans Arnold, the Oneida Herkimer Solid Waste Management Authority has "made a commitment as the responsible party should there be any legal action in the future." Pet. App. at 428a.

When marketing the region to outside businesses looking to relocate, and when advising and assisting existing businesses to expand, Mohawk Valley EDGE can definitely answer their important question about environmental tort liability. The comprehensive solid waste management plan, which includes Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990, provides a responsible party, both from a legal sense and from a practical sense, to protect against future liability.

## II. The Second Circuit Was Correct In Finding That The Local Benefits Could Not Be Achieved "In Any Other Way"

The *Pike* balancing test requires an analysis as to whether the local benefits "could be promoted by a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). It is respectfully submitted that the local benefits set forth above could not be achieved by any other method.

It is only through flow control that the local government is able to ensure that its waste management standards are met and thereby effectively provide tort liability protection to its citizens, including its businesses and haulers. As stated by Dr. Stavins:

> (F)low control significantly increases the ability of the authority to enforce the law . . . Were haulers able to bring their waste to any disposal site, an equal level of enforcement would be much more costly — if not impossible — to achieve.

Pet. App. at 389a.

Petitioners' answer to the environmental liability issue is to suggest that the Counties would be wise to avoid the issue altogether. In their brief, Petitioners state as follows:

> This putative justification for flow control is misguided. If a commercial hauler were to pick up waste from a business or residence and then bring it to a processing or disposal facility unconnected with the Counties, respondents never would come into possession of the waste and would not have any liability for it . . . Indeed, if respondents genuinely wanted to minimize exposure to environmental liability, it would be rational for them to ***encourage*** the use of private waste disposal alternatives.

*See* Petitioners' Brief, p. 19.

The line of reasoning is echoed in the Brief of Amici Curiae National Solid Wastes Management Association, American Trucking Associations, Inc. and National Association of Manufacturers, when they state as follows:

> A local government would not have any Superfund or other liability for waste collected by private haulers disposed of at a private landfill.

*See* Brief of Amici Curiae National Solid Wastes Management Association, American Trucking Association, Inc., and National Association of Manufacturers, pp. 23-24.

This argument by Petitioners and their Amici is a slap in the face to the businesses that provide jobs for the citizens of the Counties and that pay taxes to support the governments of the Counties. Petitioners are urging the Counties to hide their heads, protect themselves and leave all potential environmental liabilities on the doorsteps of their businesses, haulers and residents. It is also insulting to the elected officials of County government. Petitioners assume that the officials only worry about the liability of County government itself, not the liability faced by the citizens and businesses of the region.

There is simply no evidence of any other alternative system that will provide the businesses, industries and haulers with a financially viable comprehensive waste management program combined with the reduction of or elimination of costly environmental suits.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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